

BEFORE THE STATE BOARD OF EQUALIZATION
OF THE STATE OF CALIFORNIA

DECISION OF THE BOARD

In the Matter of the Petition and Claims for Refund of THOMAS E. FERRARI *Petitioner*

Appearances:

For Petitioner: Mr. Thomas E. Ferrari, Ph.D.
Mr. David R. Firman

*For Business
Taxes Appeals
Review Section,
Legal Division:*

Mr. Donald J. Hennessy
Assistant Chief Counsel

*For Sales and
Use Tax*

Department: Mr. John Waid
Staff Counsel

MEMORANDUM OPINION

This opinion considers the merits of a petition for redetermination in the amount of \$12,158.40 in tax for the period January 1, 1986 through December 31, 1988 and for claims for refund for unspecified amounts for the period January 1, 1989 through December 31, 1991. The Board heard this matter on September 29, 1993.

Petitioner is a sole proprietor engaged in the business of selling pollen and pollen inserts since 1986. Petitioner obtained his Ph.D. in horticulture in 1970 and has worked in the area of pollination and crop productivity for many years.

In 1986 petitioner invented a device for dispensing pollen for which he obtained a U.S. patent. The hive pollen dispenser is a device which is placed in the entrance of a bee hive and is constructed so that the bees are forced to walk through pollen when entering or exiting the hive. The pollen is picked up by the bees and carried to the flowers they visit thus accomplishing cross-pollination. Petitioner's method of supplementing an orchard's natural pollination can be used for a variety of fruit trees.

Petitioner contracts with farmers and collects the pollen from their trees. Petitioner then cleans and disinfects the pollen so that any disease which the pollen is carrying is eliminated. The pure pollen is then sold to farmers who use petitioner's pollen dispenser to supplement the natural pollination of their trees. When wind is the natural pollinator, petitioner's pollen may be sprayed onto the trees or placed in a bag that is shaken over the trees.

The Sales and Use Tax Department audited petitioner's business and concluded that all sales of pollen were subject to sales tax. The Department relied on Sales and Use Tax Annotation 510.1260 dated June 25, 1970 which provides that the sale of walnut pollen "artificially" introduced into walnut blossoms to effect pollination was subject to sales tax because the walnut pollen was not sold for incorporation into a product for resale.

Petitioner contends that this annotation is incorrect and that sales of pollen qualify for exemption under Revenue and Taxation Code Section 6358(c) which exempts sales of seeds and annual plants the products of which ordinarily constitute food for human consumption or are sold in the regular course of business. In support of his position, Dr. Thomas E. Ferrari, PhD has stated that pollen is an autonomous, free-living organism during part of its life cycle. Pollen, termed a haploid, can undergo a series of developmental changes in form, with its function in life being to reproduce itself. To do so, the pollen must grow and the sperm cells contained within the pollen must fuse with an egg (another haploid organism). At this point, the autonomous life of pollen ends and upon fusion with an egg becomes a different organism (a diploid). This new organism has a life cycle of its own and can be annual, like garden vegetables, or perennial, like an oak tree. The pollen, however, is regenerated annually during bloom and has its own life cycle.

Dr. Ferrari goes on to clarify that the alternation of haploid and diploid phases, termed generations, occur throughout the plant kingdom. He rationalizes the pollen situation as a "life cycle within a life cycle". In pollen, the haploid and the diploid stages have their own individual life forms which occur sequentially and at least for pollen occur annually.

OPINION

Revenue and Taxation Code Section 6358(c) provides that there are exempted from the taxes imposed by this part the gross receipts from the sales of and the storage, use, or other consumption of seeds and annual plants the products of which ordinarily constitute food for human consumption. This statute is further clarified in Sales and Use Tax Regulation 1588(a) which provides that tax does apply to sales of nonannual plants, such as fruit trees, regardless of the fact that the products will be sold or used as food for human consumption.

While clearly the trees themselves do not qualify for exemption, the product sold by petitioner is the pollen from these trees. Dr. Ferrari has testified that the pollen is itself a plant that is regenerated annually so that the fruit can be produced. It starts its life cycle in the form of a haploid, a recognized phase in the plant kingdom, and ends its life cycle when it fuses with an egg which will ultimately mature into the fruit or nut. We conclude that the pollen meets the definition of an annual plant in Revenue and Taxation Code Section 6358(c).

We also conclude that Sales and Use Tax Annotation 510.1260 dated June 25, 1970 is inconsistent with this conclusion and should be deleted.

Done at Sacramento, California, this 30th day of June, 1994.

Brad Sherman, Chairman

Matthew K. Fong, Member

Ernest J. Dronenburg, Jr., Member

Winnie Scott, Member

Attested by: E. L. Sorensen, Jr., for Executive Director